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12 *X HOLDINGS II, INC. and Twitter Inc.*

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15
16 WILLIAM HERESNIAK, on behalf of
17 himself and all others similarly situated,

18 Plaintiff,

19 vs.

20 ELON R. MUSK, X HOLDINGS I, INC., X
21 HOLDINGS II, INC., and TWITTER, INC.,

22 Defendants.
23

CASE NO. 3:22-CV-03074-CRB-SK

**DEFENDANTS X HOLDINGS I, INC., X
HOLDINGS II, INC., AND TWITTER,
INC.'S MOTION TO DISMISS THE
SECOND AMENDED COMPLAINT**

Judge: Hon. Charles R. Breyer

Courtroom: 6, 17th Floor

Hearing Date: May 12, 2023

Time: 10 a.m.

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PLEASE TAKE NOTICE THAT, on May 12, 2023, or as soon thereafter as it may be heard, Defendants X Holdings I, Inc., X Holdings II, Inc. (“Holding Companies”) and Twitter, Inc. (“Twitter”) will hereby move the above entitled Court to dismiss Plaintiff’s Second Amended Complaint (“SAC”) (Dkt. 66).¹

This motion asks the Court to: (1) dismiss the SAC in its entirety pursuant to Rules 12(b)(1) and 12(b)(6) because Plaintiff is neither a party to nor third-party beneficiary of the Merger Agreement between Twitter and the Holding Companies and therefore lacks standing to bring any claim to enforce it and, independently, because Plaintiff’s claims are derivative in nature and he lacks standing to bring them as he is no longer a shareholder of Twitter; (2) dismiss the SAC in its entirety under the doctrine of forum non conveniens as it was filed in violation of the forum-selection clause in Twitter’s Bylaws and the Merger Agreement; (3) dismiss, pursuant to Rule 12(b)(6), the First Cause of Action for aiding and abetting breach of fiduciary duty against the Holding Companies for failure to state a claim; and (4) dismiss, pursuant to Rule 12(b)(6) the Second Cause Action for declaratory relief against all Defendants for failure to state a claim.

SUMMARY OF ARGUMENT

Plaintiff has filed this action in the wrong Court, violating two applicable forum-selection clauses, seeking a declaration and injunction regarding a contract he has no standing to enforce, and asserting a claim against the Holding Companies based on a single conclusory allegation that they took unidentified “actions” constituting aiding and abetting breach of fiduciary duty. The defective Second Amended Complaint should be dismissed in its entirety, with prejudice.

First, Plaintiff lacks standing to pursue claims relating to enforcement of the Twitter Merger Agreement for a simple reason: Plaintiff is not a party nor third-party beneficiary to that contract. *See Crispo v. Musk*, No. 2022-0666-KSJM, 2022 WL 6693660, at *1 (Del. Ch. Oct. 11, 2022) (rejecting Twitter shareholder standing under the *exact same* Merger Agreement at issue in this case). Plaintiff also seeks damages pro rata for shareholders based on the Merger consideration they received. That is a quintessential shareholder derivative claim, *In re First*

¹ In relevant part, the Holding Companies and Twitter also join in the motion filed contemporaneous herewith by Defendant Elon R. Musk (the “Musk Motion”).

1 *Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 861 (Del. Ch. 1998), which Plaintiff
 2 likewise lacks standing to bring because he is no longer a Twitter shareholder. *In re Match Grp.,*
 3 *Inc. Derivative Litig.*, 2022 WL 3970159, at *11 (Del. Ch. Sept. 1, 2022).

4 **Second**, even if Plaintiff had standing to bring these claims, he is barred from bringing
 5 them in this Court by two separate forum-selection clauses. The action should be dismissed under
 6 the doctrine of forum non conveniens. Plaintiff, a former Twitter shareholder, is bound by the
 7 mandatory forum-selection clause in Twitter's Bylaws requiring that the Court of Chancery for the
 8 State of Delaware ("Chancery Court") "be the sole and exclusive forum" for "any action asserting
 9 a claim of breach of a fiduciary duty owed by, or otherwise wrongdoing by, any director." This
 10 clause applies to Plaintiff's aiding and abetting claim since an underlying breach of fiduciary duty
 11 by a director is a necessary element. Indeed, courts here and in Delaware have found that forum-
 12 selection clauses containing identical language apply to aiding and abetting claims by
 13 shareholders. *See e.g., In re Facebook, Inc. S'holder Derivative Priv. Litig.*, 367 F. Supp. 3d 1108,
 14 1121 (N.D. Cal. 2019); *Ocegueda on behalf of Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 648
 15 (N.D. Cal. 2021). On top of all that, the Merger Agreement—the **very contract Plaintiff seeks to**
 16 **enforce**—has a forum-selection clause mandating that all claims relating to it be filed in Delaware.
 17 Plaintiff—a Virginia resident asserting Delaware law claims and seeking to enforce a contract
 18 governed by Delaware law—lacks any credible argument under the Ninth Circuit's forum non
 19 conveniens factors to prevent enforcement of these clauses. They should be enforced and wasteful
 20 parallel litigation avoided.

21 **Finally**, Plaintiff's individual causes of action against the Holding Companies and Twitter
 22 fail on the merits and should be dismissed pursuant to Rule 12(b)(6). Plaintiff asserts that the
 23 Holding Companies aided and abetted a breach of fiduciary duty, which requires him to plead that
 24 they conspired with Twitter's Board and directed (or participated) in its decisions with knowledge
 25 of their wrongdoing. Yet the only allegation against them is that they "took" some unidentified
 26 "actions at Musk's direction to carry out his unlawful conduct." (SAC ¶ 200.) Plaintiff's second
 27 cause of action fares no better. Plaintiff seeks a declaratory judgment on the moot question of
 28 when the conditions for closing Mr. Musk and the Holding Companies' acquisition of Twitter

1 were satisfied. But the transaction has already closed, Plaintiff has already received merger
 2 consideration, and there are no allegations of future harm or that this declaration will have any
 3 impact on Plaintiff’s ongoing relationship with the Defendants—indeed, there is no relationship
 4 between the parties. The demand for declaratory relief therefore is moot, as it seeks only redress
 5 for past alleged wrongs, and “there is no basis for declaratory relief where only past wrongs are
 6 involved.” *Osseous Techs. of Am., Inc. v. DiscoveryOrtho Partners LLC*, 191 Cal. App. 4th 357,
 7 366 (2010) (citing 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 869, p. 284). Accordingly,
 8 this claim should be dismissed independently.

9 **STATEMENT OF ISSUES TO BE DECIDED**

10 1. Should the Court dismiss the SAC for lack of standing where Plaintiff, a former
 11 Twitter shareholder, (1) seeks to enforce a Merger Agreement to which he is neither a party nor
 12 third-party beneficiary and (2) brings claims to recover damages on behalf of Twitter as a whole
 13 that are derivative in nature?

14 2. Should the Court dismiss the SAC where Plaintiff filed this action in California in
 15 violation of the forum-selection clause in Twitter’s Bylaws and the forum-selection clause in the
 16 Merger Agreement on which Plaintiff sues?

17 3. Should the Court dismiss Plaintiff’s aiding and abetting breach of fiduciary duty
 18 claim where Plaintiff failed to allege the elements of that claim?

19 4. Should the Court dismiss Plaintiff’s declaratory and injunctive relief claim
 20 pertaining to the Merger Agreement where Plaintiff only seeks to redress past harm?

21 **FACTUAL AND PROCEDURAL BACKGROUND**

22 The Merger Agreement and Twitter Transaction. On April 25, 2022, Mr. Musk and the
 23 Holding Companies executed an agreement to acquire Twitter at \$54.20 per share. (SAC ¶ 101);
 24 *see also* Declaration of Michael T. Lifrak (“Lifrak Decl.”) Ex. 4, “Merger Agreement”) The
 25 Merger Agreement did not set a closing date for the transaction. (Merger Agreement § 2.2.)
 26 Following the settlement of brief and well-publicized litigation between Mr. Musk, the Holding
 27 Companies, and Twitter, the transaction closed on October 27, 2022 and Twitter’s shareholders
 28

1 were paid merger consideration at the \$54.20 per share price set in the Merger Agreement. (SAC
2 ¶ 34.)

3 The First Amended Complaint. Before the transaction closed, Plaintiff, a Virginia resident
4 and purported Twitter shareholder (SAC ¶ 39), filed this putative class action against Elon Musk,
5 Twitter, and the Holding Companies. Plaintiff filed a First Amended Complaint (“FAC”) on
6 July 1, 2022 asserting causes of action for (1) aiding and abetting breach of fiduciary duty against
7 Mr. Musk and the Holding Companies, (2) declaratory and injunctive relief against Twitter, the
8 Holding Companies, and Mr. Musk, and (3) unjust enrichment against Mr. Musk. (FAC ¶¶ 155-
9 169.) Plaintiff initially sought damages arising from Twitter’s declining share price following the
10 announcement of the merger, some unspecified declaration and injunctive relief seeking to enforce
11 some aspect of the Merger Agreement on Twitter’s behalf, and disgorgement of profits and money
12 earned by Mr. Musk in connection with Twitter stock. (*Id.*)

13 The Second Amended Complaint. After the transaction closed and Plaintiff was paid
14 \$54.20 in merger consideration in exchange for his Twitter stock, Plaintiff amended his
15 Complaint. The SAC asserts the exact same causes of action as the FAC but now seeks damages
16 for lost interest on merger consideration, a *post facto* declaration concerning the closing conditions
17 of the already-closed Merger Agreement (and unspecified injunctive relief), and disgorgement
18 arising from Mr. Musk and the Holding Company’s acquisition of Twitter (“Merger”). (SAC
19 ¶¶ 195-209.) The SAC does not seek to challenge the validity or fairness of the Merger, nor does
20 it allege that Twitter’s shareholders were deprived of the \$54.20 per share merger consideration as
21 provided by the Merger Agreement. Instead, the gist of Plaintiff’s SAC is that Mr. Musk
22 wrongfully delayed the closing of the transaction by a month-and-a-half and thereby damaged
23 Plaintiff by depriving shareholders of six weeks of interest on merger consideration, (SAC ¶¶ 195-
24 209.). In addition, the SAC asserts that Mr. Musk aided and abetted Twitter directors Jack Dorsey
25 and Egon Durban’s breaches of their fiduciary duties to Twitter in connection with the negotiation
26 of the Merger Agreement governing the acquisition and made disparaging statements about
27 Twitter following the execution of the Merger Agreement (*id.*).
28

1 The SAC asserts two causes of action against the Holding Companies²: (1) aiding and
 2 abetting breach of fiduciary duty and (2) declaratory and injunctive relief relating to the Merger
 3 Agreement. (SAC ¶¶ 195-205.) As to the first, the only allegation against the Holding Companies
 4 is that they are “controlled by Musk and took actions at Musk’s direction to carry out his unlawful
 5 conduct.” (*Id.* ¶ 200.) The SAC does not plead any facts establishing Mr. Musk’s control over the
 6 Holding Companies or identify any purported “actions” they allegedly took at Mr. Musk’s
 7 direction. As to the second cause of action, the only allegations against the Holding Companies is
 8 that they signed the Merger Agreement. (*Id.* ¶ 204.) The SAC also asserts a single cause of action
 9 against Twitter for declaratory and injunctive relief, alleging only that Twitter was a party to the
 10 Merger Agreement. (SAC ¶ 205.)

11 The SAC alleges that on April 25, 2022, the Holding Companies, Twitter, and Mr. Musk
 12 executed the Merger Agreement. (SAC ¶¶ 101, 204.) Plaintiff does not allege that he is a party to
 13 or a third-party beneficiary of the Merger Agreement—to the contrary, he alleges the Merger
 14 Agreement is between the *Defendants*, not Plaintiff. (*Id.*, ¶¶ 204-05.)

15 Relevant Beneficiary Provisions in the Merger Agreement. The Merger Agreement
 16 contains a “No Third-Party Beneficiaries” provision which states that the agreement “is not
 17 intended to and shall not confer upon any Person other than the parties hereto any rights or
 18 remedies hereunder” except for limited carve outs—D&O Indemnified Parties, Company Related
 19 Parties³, and Parent Related Parties—that do not apply—and are not alleged in the SAC to
 20 apply—to Plaintiff in this case. (Merger Agreement, § 9.7; *see generally* SAC).

21 Notably, the Chancery Court has already held in *Crispo v. Musk*, C.A. No. 2022-0666-
 22 KSJM, another shareholder class action lawsuit brought to enforce the Merger Agreement that,

23
 24 ² As alleged in the SAC, the Holding Companies are Delaware corporations formed to effectuate
 25 the purchase of Twitter, a Delaware corporation. (SAC ¶ 42.) X Holdings II is the “Acquisition
 26 Sub” and X Holdings I is its parent. (*Id.*) Twitter is a Delaware corporation too. (*Id.* ¶ 40.)

27 ³ The term “Company Related Parties” is defined to include Twitter stockholders. (Merger
 28 Agreement, § 8.3(c)(i).) However, this provision only serves to protect Twitter shareholders from
 liability in the event of a failure to consummate the Merger Agreement by limiting the Holding
 Companies’ remedy. Thus, it would only apply in a situation where the Holding Companies
 sought damages from Twitter shareholders.

1 under Section 9.7, Twitter shareholders do not have “third-party beneficiary standing to
2 specifically enforce the Merger Agreement.” *Crispo v. Musk*, No. 2022-0666-KSJM, 2022 WL
3 6693660, at *11 (Del. Ch. Oct. 11, 2022).

4 Relevant Forum Selection Provisions in the Twitter Bylaws and Merger Agreement.

5 Plaintiff’s claims in the SAC are subject to the forum-selection clauses in Twitter’s Bylaws and
6 the Merger Agreement. Twitter’s Bylaws contain a forum-selection clause stating, in relevant
7 part, “the Court of Chancery of the State of Delaware . . . shall, to the fullest extent permitted by
8 law, be the sole and exclusive forum for . . . any action asserting a claim of breach of a fiduciary
9 duty owed by, or otherwise wrongdoing by, any director. . . of the corporation to the corporation
10 . . . “ (Lifrak Decl. Ex. 3, Bylaws, Art. VIII.) The Bylaws also mandate that “any derivative
11 action” also be brought in Chancery Court. (*Id.*)

12 The Merger Agreement contains a forum-selection clause that provides that “each of the
13 parties . . . agree that it will not bring any action relating to this Agreement . . . in any court other
14 than the Delaware Court of Chancery, any other court of the State of Delaware or any federal
15 court sitting in the State of Delaware.” (Merger Agreement, § 9.10(a)(iii).)

16 **ARGUMENT**

17 **I. PLAINTIFF LACKS STANDING TO BRING MERGER CLAIMS**

18 First, and fundamentally, Plaintiff’s causes of action against the Holding Companies and
19 Twitter should be dismissed pursuant to Rule 12(b)(1) and 12(b)(6) because Plaintiff lacks
20 standing to enforce the terms of the Merger Agreement. He thus cannot bring his claim for
21 declaratory relief regarding the Merger Agreement or his derivative claims for aiding and abetting
22 breach of fiduciary duties against the Holding Companies, *see Lewis v. Anderson*, 477 A.2d 1040,
23 1049 (Del. 1984) (“A plaintiff who ceases to be a shareholder, whether by reason of a merger or
24 for any other reason, loses standing to continue a derivative suit.”).

25 “Under Rule 12(b)(1), a defendant may move to dismiss for lack of standing and thus lack
26 of subject matter jurisdiction.” *Hart v. Facebook Inc.*, 2022 WL 1427507, at *5 (N.D. Cal. May 5,
27 2022) (Breyer, J.). “The burden of establishing . . . standing rests on the party asserting the claim.”
28 *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009). And the failure

1 to adequately plead standing warrants dismissal under Rule 12(b)(6) for failure to state a claim.
 2 *MAI Systems Corp. v. UIPS*, 856 F. Supp. 538, 540 (N.D. Cal. 1994) (“Failure to properly allege
 3 standing is ground for dismissal under Rule 12(b)(6).”).

4 **A. Plaintiff Is Not A Party To Or A Third-Party Beneficiary Of The Merger**
 5 **Agreement**

6 Each of Plaintiff’s claims seek to enforce or obtain relief under the Merger Agreement
 7 between the Defendants. Plaintiff’s first cause of action for aiding and abetting seeks “damages,
 8 including lost interest and monies due to the wrongful delay in the closing of the Merger” and
 9 Plaintiff’s second cause of action for declaratory and injunctive relief seeks to enforce the Merger
 10 Agreement through a “declaratory judgment that all conditions necessary for the closing of the
 11 Merger were satisfied as of September 13, 2022” and “appropriate injunctive relief” to effectuate
 12 that declaration. (SAC ¶¶ 201, 205). But Plaintiff has not alleged that he is a party to or a third-
 13 party beneficiary of the Merger Agreement and the Chancery Court has already held that former
 14 Twitter shareholders—like Plaintiff—have no standing to enforce it. *Crispo*, 2022 WL 6693660,
 15 at *5 (“the plain language of Section 9.7 supports a holding that the parties to the Merger
 16 Agreement did not intend to confer third-party beneficiary standing to Twitter’s stockholders”).

17 In *Crispo*, the Chancery Court held that Section 9.7 of the Merger Agreement—which
 18 expressly states that it is “not intended to and shall not confer upon any Person other than the
 19 parties hereto any rights or remedies”—is a blanket prohibition that “signals an intent to disclaim
 20 stockholders as third-party beneficiaries” and barred Twitter shareholders from bringing suit to
 21 enforce the Merger Agreement. *Crispo*, at *4. Moreover, the Chancery Court noted that the fact
 22 that the Merger Agreement included a limited carve-out to this prohibition to protect shareholders
 23 from liability in any action brought by the Holding Companies indicated that Twitter
 24 “stockholders are not third part[y] [beneficiaries] in other contexts.” *Id.* at *5. As confirmed by
 25 the Chancery Court, the plain language of the Merger Agreement makes clear that Plaintiff is not a
 26
 27
 28

1 third-party beneficiary and therefore has no standing to assert claims pursuant to the Agreement.⁴

2 It is well-settled under Delaware law, which governs the Merger Agreement (SAC ¶ 103),
 3 that only parties to a contract and intended third-party beneficiaries have standing to enforce
 4 contracts. *See, e.g., E.I. du Pont de Nemours & Co. v. MacDermid Printing Sols. L.L.C.*, 248 F.
 5 Supp. 3d 570, 575 (D. Del. 2017); *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922
 6 A.2d 417, 434 (Del. Ch. 2007). Accordingly, Plaintiff simply lacks standing to bring a claim for
 7 declaratory relief or damages under the Merger Agreement, and his claims must be dismissed with
 8 prejudice. *See Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Zonko Builders, Inc.*, No. CV 21-437-
 9 MAK, 2021 WL 4061564, at *12 (D. Del. Sept. 7, 2021) (ruling that plaintiffs “lack standing to
 10 seek declaratory judgment regarding [a contract] to which they are not parties . . .”); *Martinez v.*
 11 *GPB Cap. Holdings, LLC*, 2020 WL 3054001, at *6 (Del. Ch. June 9, 2020) (non-party had no
 12 standing to seek specific performance of an agreement with no third-party beneficiary status).

13 **B. Plaintiff Has No Standing To Bring His Claims Because They Are Derivative**

14 As articulated in the Musk Motion, Plaintiff also lacks standing to bring his claims because
 15 they are derivative—as they seek to obtain relief on behalf of Twitter and not individual
 16 shareholders—and Plaintiff’s standing to bring the claims were extinguished when the Merger
 17 closed. *See Lewis*, 477 A.2d at 1049. The Holding Companies and Twitter accordingly join the
 18 Musk Motion on those grounds and incorporate all argument by reference herein.

19 **II. PLAINTIFF FILED THIS ACTION IN THE WRONG FORUM**

20 Even apart from the dispositive standing issues, Plaintiff improperly filed his action in the
 21 Northern District of California in violation of two separate and binding forum-selection clauses:
 22 (1) the forum selection clause in Twitter’s Bylaws, which requires that any action “asserting a
 23 claim of breach of a fiduciary duty owed by, or otherwise wrongdoing by, any director” of Twitter

24 ⁴ Nor can Plaintiff rely on Section 8.2 of the Merger Agreement to manufacture an argument that
 25 it provides him with standing to pursue a claim for damages for a delayed closing. That provision
 26 only applies to claims for damages arising from the “termination” of the Merger Agreement, not a
 27 delayed closing. (Merger Agreement § 8.2.) Moreover, as the Chancery Court in *Crispo* noted,
 28 the language in Section 8.2 “mimics . . . provisions that are not intended to grant third-party
 beneficiary status to stockholders” and thus would not confer standing even if applicable. *See*
Crispo, at *11.

1 be brought in the Chancery Court, and (2) the Merger Agreement’s forum-selection clause, which
 2 requires that any “action relating to this Agreement” be filed in Delaware. Under the doctrine of
 3 forum non conveniens, these “forum-selection clause[s] should be given controlling weight in all
 4 but the most exceptional cases,” *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571
 5 U.S. 49, 63 (2013), and “must [be] enforc[ed]...unless the contractually selected forum affords the
 6 plaintiffs no remedies whatsoever.” *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d
 7 1081, 1092 (9th Cir. 2018).

8 To determine whether to dismiss an action to enforce the parties’ agreed upon forum,
 9 courts consider (1) whether the action falls within the scope of the forum-selection clause, (2)
 10 whether the clause is valid and enforceable, and (3) whether public interest factors weigh against
 11 enforcement (they rarely do). *See id.* at 1086-88. Plaintiff “must bear the burden of showing
 12 why” the clause should not be enforced. *Atl. Marine*, 571 U.S. at 63. The forum-selection clauses
 13 in Twitter’s Bylaws and the Merger Agreement are valid, enforceable, and require that Plaintiff’s
 14 claims be pursued in Delaware. The Court should enforce the clauses and dismiss this action.

15 **A. The Action Falls Within the Forum-Selection Clauses**

16 **1. Twitter’s Bylaws Mandate That This Action Be Litigated In Delaware.**

17 The Bylaws’ forum-selection clause states that the Chancery Court “shall...be the sole and
 18 exclusive forum for...any action asserting a claim of breach of fiduciary duty owed by, or
 19 otherwise wrongdoing by, any director.” (Bylaws at Art. VIII.) Plaintiff asserts the Holding
 20 Companies and Mr. Musk aided and abetted a breach of fiduciary duty by two of Twitter’s
 21 directors. (SAC ¶¶ 195-202.) The claim is covered by this clause. *See In re Facebook*, 367 F.
 22 Supp. 3d at 1119 (dismissing aiding and abetting claim in shareholder action pursuant to forum-
 23 selection clause covering “any action asserting a claim of breach of fiduciary duty owed by, or
 24 other wrongdoing by, any director”); *In re Pattern Energy Grp. Inc. Sec. Litig.*, 2022 WL 263312,
 25 at *9–10 n. 8 (D. Del. Jan. 27, 2022), *report and recommendation adopted by* 2022 WL 957761
 26 (D. Del. Mar. 30, 2022) (same).

27 Plaintiff’s claim for aiding and abetting breach of fiduciary duty requires a finding that
 28 Directors Dorsey and Durban breached their fiduciary duties to Twitter and engaged in

wrongdoing in connection with the acquisition. *See Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001); (SAC ¶¶ 195-205.) To establish this, Plaintiff must prove that the directors owed and breached a fiduciary duty to Twitter. *Id.* (“the complaint must allege facts that satisfy the four elements of an aiding and abetting claim: ‘(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary’s duty...’”). It is axiomatic that aiding and abetting “assert[s] a claim of breach of fiduciary duty,” which is why courts in this District and in Delaware have found that language in forum-selection clauses identical to the one here apply to such claims. *See In re Facebook*, 367 F. Supp. 3d at 1120; *Pattern Energy*, 2022 WL 263312, at * 10 n. 8. Plaintiff’s action also falls within the scope of the clause because he alleges that Dorsey, a Twitter director, engaged in wrongdoing in connection with the merger (*e.g.*, ¶ 93), which is also included in the clause.

Plaintiff attempts to plead around this latter clause by *foregoing* a direct claim for breach of fiduciary duty—and arguing that Article VIII only pertains to a “claim for breach of fiduciary duty” and “cannot be read to cover [his] claim for *aiding and abetting* a breach of [that] fiduciary duty.” Dkt. 61 at 4 (emphasis added). Plaintiff’s argument is atextual. The language of Article VIII is *not* limited to a bare breach of fiduciary duty claim, but applies to *any action* that asserts a breach of that duty (or *any other wrongdoing* by a company director). Nor does Article VIII limit itself to an action brought *against* the company director directly. On its face, aiding and abetting a breach of a director’s fiduciary duty is contemplated by the forum-selection clause.

Plaintiff’s argument also ignores the weight of cases in this judicial district that have examined the *exact same forum-selection language* as found in Twitter’s Bylaws and determined that it applies as much to aiding and abetting a breach of fiduciary claims as it does to bare fiduciary duty claims. *See In re Facebook*, 367 F. Supp. 3d at 1122; *Ocegueda*, 526 F. Supp. 3d at 650. Plaintiff’s argument also ignores that courts look at “the substance of [] plaintiff’s claims, stripped of their labels” in determining whether the claim falls within the scope of the forum selection clause. *Skold v. Galderma Lab ’ys, L.P.*, 99 F. Supp. 3d 585, 609 (E.D. Pa. 2015). Thus, “[c]ourts in Delaware and other jurisdictions have found that ‘[a] forum selection clause should not be defeated by artful pleading of claims’ avoiding the claim contained in the forum selection

1 clause. *Ashall Homes Ltd. v. ROK Ent. Grp. Inc.*, 992 A.2d 1239, 1252 (Del. Ch. 2010) (citing
 2 *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *3 (Del. Ch. Oct. 19, 2000)). Particularly,
 3 where the claim made involves “the same operative facts” as the claim omitted and “ultimately
 4 depend[s] on the existence of” this omitted claim. *Direct Mail Prod. Servs. Ltd. v. MBNA Corp.*,
 5 2000 WL 1277597, at *6 (S.D.N.Y. Sept. 7, 2000).

6 2. The Merger Agreement Requires That All Of Plaintiff’s Claims Be Brought
 7 in Delaware.

8 The Merger Agreement provides that the parties may “not bring any action relating to this
 9 Agreement or the transactions contemplated by this Agreement in any court other than the
 10 Delaware Court of Chancery, any other court of the State of Delaware or any federal court sitting
 11 in the State of Delaware.” (Merger Agreement § 9.10.) Forum-selection clauses “covering
 12 disputes ‘relating to’ a particular agreement apply to any disputes that reference [] or have some
 13 ‘logical or causal connection’ to the agreement,” and not just those that “grow out of” or “require
 14 interpretation of” the contract at issue. *Yei A. Sun*, 901 F.3d at 1086; *Manila Indus., Inc. v.*
 15 *Ondova Ltd. Co.*, 334 F. App’x 821, 823 (9th Cir. 2009) (forum selection provision covered
 16 plaintiff’s claims because claims “relate[d] in some way” to the “rights and duties enumerated in
 17 the Agreement”). There can be no dispute that all of Plaintiff’s claims “relate” to the Merger
 18 Agreement—the First Cause of Action as to misconduct under the Merger Agreement (SAC ¶¶
 19 195-202), the Second Cause of Action seeking declarative relief under the Merger Agreement (*id.*
 20 ¶¶ 203-205) and the Third Cause of Action seeking restitution because of a delay in closing under
 21 the Merger Agreement (*id.* ¶¶ 206-209).

22 Plaintiff’s position, however, is that even though he seeks to enforce the Merger
 23 Agreement, it is not enforceable **against him**, stating: “[t]he forum selection clause in the Merger
 24 Agreement . . . does not bind [him] because he was not a signatory.” Dkt. 61 at 4. Plaintiff
 25 misstates the law. It is well established that **non-parties** to a forum-selection clauses are
 26 nevertheless bound where their claims are “closely related to the contractual relationship.”
 27 *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n. 5 (9th Cir. 1988); *Hadley v. Shaffer*,
 28 2003 WL 21960406, at *6 (D. Del. Aug. 12, 2003). Where, as here, a non-party’s claim requires

1 the determination of some aspect of the underlying agreement that contains the forum-selection
 2 clause, it is “closely related” and enforcement of the forum-selection clause against the non-party
 3 is proper. *Meyer v. Howmedica Osteonics Corp.*, 2015 WL 728631, at *13 (S.D. Cal. Feb. 19,
 4 2015); *see also Vistage Worldwide, Inc. v. Knudsen*, 2020 WL 71140, at *7 (S.D. Cal. Jan. 7,
 5 2020) (collecting cases applying the “closely related” test).

6 **B. The Forum-Selection Clauses Are Valid And Enforceable**

7 As to the second factor, the Bylaws’ forum-selection clause is enforceable against Plaintiff,
 8 a Twitter shareholder.

9 When Plaintiff purchased stock, he agreed to be bound by Twitter’s valid Bylaws—
 10 including the forum-selection clause. *See Facebook*, 367 F. Supp. 3d at 1122 (enforcing forum-
 11 selection clause in certificate of incorporation); *Boilermakers Loc. 154 Ret. Fund v. Chevron*
 12 *Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (“a forum-selection clause adopted by a board with the
 13 authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other
 14 contractual forum selection clauses”); *In re: CytRx Corp. S’holder Derivative Litig.*, 2015 WL
 15 9871275, at *4 (C.D. Cal. Oct. 30, 2015).

16 The Merger Agreement forum-selection clause is also valid and enforceable, indeed, for
 17 Plaintiff to argue otherwise would require him to abandon his claims altogether that are predicated
 18 on enforceability of the Merger Agreement.

19 **C. Public Interest Factors Weigh In Favor Of Enforcement**

20 Finally, Courts may consider “public interest” factors—court congestion and
 21 administration concerns, local interest, and which forum is more “at home” with the law at issue—
 22 but they “rarely” defeat a motion. *Atl. Marine*, 571 U.S. at 64. In any event, these factors weigh
 23 heavily in favor of enforcing the forum selection clause and favors dismissal. Substantive
 24 litigation on the Merger issues between Twitter and Mr. Musk have been pursued and continue to
 25 be pursued in Delaware. *Crispo*, for example, in Chancery Court involving issues associated with
 26 the Merger that overlap with Plaintiff’s claims, and the litigation between Mr. Musk and Twitter
 27 itself in that forum (before the same Judge). “Permitting [the] situation,” Plaintiff seeks, in which
 28 multiple cases about the same issues “are simultaneously pending in different . . . [c]ourts leads to

1 the wastefulness of time, energy and money.” *See Cont’l Grain Co. v. The FBL*-585, 364 U.S. 19,
 2 26 (1960). Dismissal of this action in favor of the forum where the precise issues in this case have
 3 and are already being litigated would prevent this waste.

4 By contrast, local interests do not favor litigation in California. Although Plaintiff alleges
 5 that some of the predicate acts occurred in this state, three of the four defendants are Delaware
 6 corporations, all Defendants have *already* litigated related issues in the Chancery Court, and
 7 Plaintiff is a Virginia resident. *See Moretti v. Hertz Corp.*, No. C 13-02972 JSW, 2014 WL
 8 1410432, at *5 (N.D. Cal. Apr. 11, 2014). Also weighing heavily in favor of dismissal: every
 9 claim requires an application of Delaware law, with which Delaware courts have more familiarity.
 10 *See CytRx*, 2015 WL 9871275, at *6. All told, this forum is inconvenient under the test employed
 11 by courts in the Ninth Circuit and should be dismissed.

12 **D. Because The Forum Selection Clauses Apply To At Least One Cause of**
 13 **Action, Forum Non Conveniens Applies To All**

14 Because the Bylaws mandate that Chancery Court, a Delaware state court, be “the sole and
 15 exclusive forum” to adjudicate Plaintiff’s aiding and abetting claim, the entire action should be
 16 dismissed under forum non conveniens. *Atl. Marine*, 571 U.S. at 60 (dismissal under forum non
 17 conveniens is “the appropriate way to enforce a forum-selection clause pointing to a state or
 18 foreign forum”). Where, as here, a mandatory forum-selection requires that at least one claim be
 19 litigated in a state forum, judicial efficiency and the interests of justice provide that the entire
 20 action be dismissed and adjudicated there. *See e.g., Minghong Inv., Inc. v. Felix Chac Chuo*, 2022
 21 WL 2189365, at *6 (C.D. Cal. Mar. 9, 2022) (dismissing entire action where a minority of claims
 22 were covered by forum-selection clause).

23 Moreover, where an action implicates multiple non-conflicting, overlapping forum-
 24 selection clauses, courts enforce the latter, more restrictive clause and dismiss the action. *Granite*
 25 *Re, Inc. v. N. Lines Contracting, Inc.*, 478 F. Supp. 3d 772, 780 (D. Minn. 2020) (citing cases).
 26 Thus, because the Bylaws’ forum-selection clause requires that the aiding and abetting claim be
 27 brought in Chancery Court and the Merger Agreement requires that *all* claims be brought in a state
 28

1 or federal court in Delaware, the entire action should be dismissed pursuant to forum non
2 conveniens. *See id.*

3 **III. PLAINTIFF FAILS TO STATE A CLAIM FOR AIDING AND ABETTING**
4 **AGAINST THE HOLDING COMPANIES**

5 Plaintiff's aiding and abetting claim against the Holding Companies should also be
6 dismissed for failure to state a claim. As discussed in Mr. Musk's Motion, the SAC fails to allege
7 an underlying breach of fiduciary duty, knowing participation in the breach by Mr. Musk, and
8 damages proximately caused by the breach. *Malpiede*, 780 A.2d at 1096. The Holding Companies
9 join that Motion. The claim should also independently be dismissed against the Holding
10 Companies because Plaintiff alleges no facts giving rise to any liability against the Holding
11 Companies with any degree of specificity. To plead aiding and abetting, Plaintiff must allege (1)
12 that the Holding Companies "participated in the board's decisions, conspired with the board, or
13 otherwise caused the board to board to make the decisions at issue," (2) with actual or constructive
14 knowledge that the conduct was legally improper. *Malpiede*, 780 A.2d at 1098.

15 The SAC does not come close to meeting these requirements. All Plaintiff alleges is that
16 the Holding Companies "took" some unidentified "actions at Musk's direction to carry out his
17 unlawful conduct." (SAC ¶ 200.) This allegation, pleaded without any underlying facts to support
18 it, is a vague conclusion insufficient to establish Plaintiff's "high" burden to plead that the
19 Holding Companies "knowingly participated" in any breach. *See Bell Atl. Corp. v. Twombly*, 550
20 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the grounds of his entitlement to relief
21 requires more than labels and conclusions"); *Malpiede*, 780 A.2d at 1098 (plaintiff must plead
22 specific facts that third party knowingly participated in breach). The SAC fails on that basis.

23 **IV. PLAINTIFF FAILS TO STATE A CLAIM FOR DECLARATORY RELIEF.**

24 Plaintiff's declaratory and injunctive relief claim should also be dismissed because it only
25 seeks a declaration regarding alleged past wrongs that are now moot and fails to allege any risk of
26 future harm. "[T]here is no basis for declaratory relief where only past wrongs are involved."
27 *Osseous Techs*, 191 Cal. App. 4th at 366; *see also Travers v. Loudon*, 254 Cal. App. 2d 926, 931
28 (1967) ("There is unanimity of authority to the effect that the declaratory procedure operates

prospectively, and not merely for the redress of past wrongs.”); *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (“[P]laintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury.”). Here, the SAC seeks a declaration regarding rights and obligations for a transaction that has already closed and whether “all conditions necessary for the closing of the Merger *were* satisfied as of September 13, 2022” (SAC ¶ 205) (emphasis added). Plaintiff makes no allegations—nor could he—that he may suffer future harm in connection with the Merger Agreement. Moreover, Plaintiff is no longer a Twitter shareholder and has no current or future contractual relationship with the Defendants. Thus, because the resolution of this controversy would have “little practical effect in terms of altering parties’ behavior”—indeed it would have no effect at all—the claim for declaratory and injunctive relief should be dismissed. *See Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 648 (2009) (affirming dismissal where plaintiff did “not allege that the continuation of the contractual relationship depends on the resolution of” the issues raised in the declaratory relief claim).

CONCLUSION

For the reasons stated herein, defendants X Holdings I, Inc., X Holdings II, Inc. and Twitter, Inc. respectfully request that the Court grant their motion and dismiss the Second Amended Complaint with prejudice.

DATED: March 3, 2023

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on all counsel of record electronically or by another manner authorized under FED. R. CIV. P. 5(b) on this the 3rd day of March 2023.

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ATTESTATION

I, Alex Bergjans, am the ECF user whose ID and password are being used to file the above document. In compliance with Local Rule 5-1(h)(3), I hereby attest that Michael T. Lifrak has concurred in the filing of the above document.

/s/ Alex Bergjans

Alex Bergjans